UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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RESPONSE OF MR. FARIZ TO THE UNITED STATES' MOTION FOR LEAVE TO FILE AN EX PARTE, IN CAMERA SUBMISSION UNDER SEAL PURSUANT TO THE CLASSIFIED INFORMATION PROCEDURES ACT

The Defendant, Hatem Naji Fariz, by and through undersigned counsel, hereby submits his response to the United States' Motion for Leave to File An *Ex Parte*, *In Camera* Submission Under Seal, Pursuant to Section 4 of the Classified Information Procedures Act and Rule 16(d)(1) of the Federal Rules of Criminal Procedure (Doc. 619).

Introduction

The government seeks "to file an ex parte, in camera submission under seal, in order to obtain authorization from the Court to deny discovery of the classified information in question." (Doc. 619 at 2). The government concedes that some of this information "arguably may be discoverable in the instant case under Rule 16 or the Brady doctrine." (Doc 619 at 1). Nevertheless, the government seeks (1) to deny the defense access to these materials, or (2) if the Court orders that these materials be produced, the government alternatively seeks to proceed under one of the alternatives provided in Section 4 of CIPA.

I. Objection to *Ex Parte* Review of Classified Material to Determine Whether Such Material is Discoverable Under Rule 16 or *Brady*

Mr. Fariz objects to the government's request for an *ex parte*, *in camera* submission to determine whether classified materials must be disclosed to the defense. Section 4 of CIPA provides that the "court *may* permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." 18 U.S.C. app. 3, § 4 (emphasis added). Where, however, defense counsel have applied for security clearances, there is no need for an *ex parte* hearing, because the classified materials may be made available to counsel who have been cleared. *See United States v. George*, 786 F. Supp. 11, 16 (D.D.C. 1991) (finding that "where the defendant and his attorneys have the requisite security clearances, the government has asserted no justification for preventing the defendant from examining the pleadings [with classified information]," and ordering the disclosure of such materials, governed by a protective order); *see also United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991) (noting that defense counsel, having obtained security clearances, had reviewed the classified information).

In the instant case, the undersigned has applied for a security clearance. Indeed, the undersigned applied for such a clearance in July 2003, and updated the application for the clearance in August 2004, pursuant to the Court's orders.[1] The government then, belatedly, filed a motion for an *ex parte*, *in camera* submission, on September 9, 2004. Mr. Fariz

[1] Another member of Mr. Fariz's defense team also applied for a security clearance in July 2003, and updated this application in August 2004.

therefore objects to the government's request, where defense counsel may receive the requisite clearances. In such a case, the government's concern about the use of an adversary hearing is misplaced. *See* Doc. 619 at 4 (citing *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988)).

Mr. Fariz's objection is further made in light of the particular circumstances and nature of this case. First, the government has not indicated whether this material is in English, or has been translated from another language into English. If the material is in a foreign language or has been translated into English, Mr. Fariz respectfully submits that an *ex parte* submission is not appropriate, where the accuracy of the government's translations has been and will continue to be one of the central disputes in this case. Otherwise, the Court will be provided an untested translation of the materials at issue. Under such circumstances, Mr. Fariz respectfully submits that the Court will not be equipped to evaluate the veracity of the translations, and Mr. Fariz will not be able to be assured that any determination of whether the materials are discoverable is based on reliable information.

Second, the complexity of the charges and sheer volume of the discovery in this case may make it exceedingly difficult, if not impossible, for the Court to determine whether these materials are discoverable in an *ex parte* proceeding. *Cf. United States v. Lemonakis*, 485 F.2d 941, 963 (D.D.C. 1973) (noting that in that case "the task of ascertaining relevance is *not* 'too complex, and the margin of error too great, to rely wholly on the *in camera* judgment' of this court") (citation omitted). For example, the Eleventh Circuit has reversed a conviction where the district court prevented the disclosure of a classified report (and

thereby prohibited cross-examination on it), where it was relevant to the defendant's specific intent to commit the offense. *See United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1365-68 (11th Cir. 1994). The Eleventh Circuit attributed the difficulty of determining relevance on a "muddled state of the law" concerning the defense at issue. *Id.* at 1368 n.18. In the instant case, the government's request that the Court consider the classified materials *ex parte* puts the Court in the difficult position of having to make determinations of whether the material is discoverable under Rule 16 or *Brady*, without a full explanation of the defense and an understanding of the details contained in the vast quantum of discovery collected by the government.

In *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998), the D.C. Circuit indicated that in applying the standard of *Roviaro*[2] – whether the material is at least "helpful to the defense of the accused" – a court should "err on the side of protecting the interests of the defendant," and that "[i]n some cases, a court might legitimately conclude that it is necessary to place a fact in context in order to ensure that the jury is able to give it its full weight." Mr. Fariz respectfully submits that the task of determining relevance or helpfulness to the defense may be exceedingly difficult, if not impossible, without an understanding of the other details in the discovery. Furthermore, the government's request would require the Court to reevaluate any determination of the relevance of undisclosed classified materials throughout the trial. For these reasons, Mr. Fariz objects to the

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[2] *Roviaro v. United States*, 353 U.S. 53 (1957).

government's request to make an *ex parte*, *in camera* submission to determine the relevance or discoverability of classified material.

II. Standards for Evaluating Whether the Material Must be Disclosed to the Defense

Should the Court allow the government to provide an *ex parte*, *in camera* submission, Mr. Fariz would respectfully submit the following response concerning the appropriate standards and procedures for determining whether classified information must be disclosed to the defense.

First, the government must make a formal claim of state secret privilege, where the claim must "'be lodged by the head of the department which has actual control over the matter, after actual personal consideration by that officer.'" *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (citing *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)); *see also United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (stating that government must at least make a colorable showing for the assertion of the privilege). In the instant case, the government already has attempted to claim the classified information privilege concerning the defendants' own conversations, only to declassify them and provide them to the defense. The government must meet this requirement as to this latest CIPA request.

Second, the government relies on the D.C. Circuit's holding that "classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege," but the defendant "is entitled only to

information that is at least 'helpful to the defense of [the] accused.'" (Doc. 619 at 7, citing *Yunis*, 867 F.2d at 623; *Roviaro*, 353 U.S. at 60-61). The full standard from *Roviaro* is "Where the [information] is relevant and helpful to the defense of an accused, *or is essential to a fair determination of a cause*, the privilege must give way." *Roviaro*, 353 U.S. at 60 (emphasis added); *Yunis*, 867 F.2d at 622 n.9. This standard is thus broader than presented by the government and may require a more searching inquiry into whether the material must be disclosed to the defense.

With respect to this determination of whether the materials are discoverable, Mr. Fariz cannot fully address this issue at the present time, because he is not yet in possession of any classified information. *Cf.* 18 U.S.C. app. 3 §§ 5, 6. This task is particularly difficult since the government alleges Mr. Fariz's participation in conspiracies involving a large number of individuals. *Cf. Yunis*, 867 F.2d at 624 (finding that defendant's task of demonstrating relevance was not superhuman, since the defendant was present during the conversations sought to be produced). Mr. Fariz would request, should the Court proceed *ex parte*, that he be provided the opportunity to submit to the Court a memorandum addressing the relevance and need of any information sought to be excluded from disclosure. *See George*, 786 F. Supp. at 17 (citing *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984)). In order for this memorandum to be meaningful, Mr. Fariz would renew his

request for a generic description of the information at issue and the charges in the indictment to which the information relates. *See* 18 U.S.C. app. 3, § 6(b)(1), (2).[3]

Finally, the government suggests that the Court should balance the need for protecting national security interests against the defendant's need for disclosure, citing *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (*en banc*). (Doc. 619 at 8-9). When, however, the information is sought to be used at trial, the Eleventh Circuit has indicated that "[t]he district court may not take into account the fact that evidence is classified when determining its 'use, relevance, or admissibility.'" *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-64 (11th Cir. 1994) (citing *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985); *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1983)); *see United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998) ("CIPA has no substantive impact on the admissibility or relevance of probative evidence."); *United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir. 1989) ("The legislative history is clear that Congress did not intend to alter the existing standards for determining relevancy and admissibility of evidence.... Accordingly, no new substantive law was created by the enactment of CIPA."); *United States v. Cardoen*, 898 F. Supp. 1563, 1571 (S.D. Fla. 1995) (declining to apply balancing

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[3] While Mr. Fariz recognizes that Section 6 is generally used to determine the use and admissibility of classified information already in the defendant's possession, it seems problematic that the government would not have to provide to the defense some generic description of the materials where the defense does not have access to these materials and yet is required to address the relevance and materiality of these materials.

test); *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1411 (S.D. Fla. 1990) (same); *see also Rezaq*, 134 F.3d at 1142 n.15 (reserving the question of whether this balancing is proper). Accordingly, this Court should examine any disclosures for discoverability, initially, independent of its classified nature. Instead, any national security interests may be taken into account in the *form* in which the materials are disclosed. *See Juan*, 776 F.2d at 258 (citing 18 U.S.C. app. 3, § 6(c)).

For the foregoing reasons, Mr. Fariz (1) objects to the use of an *ex parte*, *in camera* proceeding to determine the discoverability of any classified information, and (2) if the Court proceeds *ex parte*, requests the opportunity to provide an *ex parte* memorandum to address the discoverability of the material at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; William Moffitt and Linda Moreno, Counsel for Sami Amin Al-Arian; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602.

/s/ M. Allison Guagliardo
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